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No. 97-636

In The

Supreme Court of the United States

October Term, 1997

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Delta's Brief in Opposition does not deny that Questions Nos. 1 through 3 involve significant and far-reaching legal issues under the ADEA relative to the interpretation of the *Hazen* case. Nor does the Brief dispute that the issues raised by Question Nos. 1-3 mirror a profound and growing conflict in the Federal Courts which should be resolved by this Court. Instead, the Brief skirts these points by arguing that the Second Circuit's extended discussion and analysis of the *Hazen* case, and its impact on Plaintiffs' proffered evidence of age bias, were mere "dicta" or "purely hypothetical". (Resp. Brief at 15).

To support its claim, Delta posits the fiction that Plaintiffs did not prevail below because their overall evidence was found to be insufficient to support a finding that Delta had refused to hire pilots because they were age 55 or older. From this, Delta argues that a reversal by this Court on the legal issues raised by Question Nos. 1 to 3, however significant they may be, would not result in Plaintiffs' prevailing on remand.

Delta has irresponsibly misrepresented the Second Circuit's *ratio decidendi*. The Second Circuit did *not* reject Plaintiffs' claims, as Delta suggests, because of any shortfall in the quanta of age-based evidence adduced below by Plaintiffs. To the contrary, Plaintiffs' proffered evidence of age-based action was found to raise an inference that Delta had indeed acted on the basis of the Plaintiffs' ages. It was rejected as insufficient to support Plaintiffs' claims only because, when reviewed in the light of *Hazen*, such evidence did not reflect any age-pejorative bias by Delta.

Delta's attempt to blur this critical distinction between evidence of age-based activity, which Plaintiffs did produce below, and evidence of age-pejorative activity, which Plaintiffs were found not to have adduced, should be rejected.

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE "AGE STEREOTYPING" ISSUE

Most of Delta's Brief consists of a discussion of why the Second Circuit's holding, from a narrow analysis of the facts, was correct. Arguing for the correctness of the decision on this basis misses the point. The issue before this Court is not whether the Second Circuit overlooked or failed to credit certain facts, but whether its rejection of Plaintiffs' evidence of age-based activity, based on its interpretation of *Hazen*, was correct. It is the Circuit's rejection of this evidence of age-based activity, as not meeting the supposed requirements of *Hazen*, and not because of any quantitative sufficiency, which is the issue raised for certification to this Court by Question No. 1.

That the Second Circuit did *not* reject Plaintiffs' case because of evidence insufficiency, as Delta claims, is clear from the Circuit's acknowledgment that Plaintiffs had adequately presented "evidence in which Delta personnel might be understood to be making reference to age". (6a).[1] The Second Circuit rejected such evidence because, in its view, it did not "reflect any age-based stereotype or belief that older pilots are less competent than younger ones". (*Id.*) — and not for any other reason. The Circuit's further assertion, that such evidence "might support an inference that Delta was reluctant to hire pilots who would shortly be disqualified from piloting and might begin drawing pension benefits" confirms that evidence insufficiency *per se* was not the basis for its decision. (*Id.*)

In concluding that, under *Hazen*, such evidence was not

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1. References followed by an "a" are to a page number of the appendix annexed to the Petition.

indicative of age discrimination because it did not show age-pejorative stereotyping (7a), the Second Circuit's interpretation only deepens an existing conflict in the Federal Courts on this issue, If certiorari is granted as to Question No. 1, Petitioners will show that Delta's refusal to hire pilots age 55 and over, because of the FAA's Age-60 Rule, or because they would soon reach an age to begin drawing down pension benefits, constituted age discrimination *per se*, without regard to any further showing of age-pejorativeness.[2]

II.

THE "ECONOMIC CONSIDERATIONS" ISSUE

Question No. 2 raises the issue of whether an "economic considerations" defense is viable to employees under *Hazen*.

On this issue, the Second Circuit found that Delta's "concern about the economic consequences of employment decisions [did] not constitute age discrimination under the ADEA, even though there may be a correlation with age." (6a). The Second Circuit based this finding on its interpretation that *Hazen* authorizes an economic justification defense to all ADEA claims.

In Petitioners' view, nothing in *Hazen* supports such a reading. If this Court believes that the availability of an "economic considerations" defense under *Hazen* is an issue that divides the Federal Courts and warrants review, certiorari should be granted as to Question No. 2.

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2. Petitioners noted in their Opening Brief that "those persons who would shortly be disqualified from piloting and might begin drawing pension benefits" were in that position solely by virtue of their attaining a certain age because of the FAA's Age-60 Rule. (Pet. at 17-21).

III.

THE "ON THE VERGE OF RETIREMENT" ISSUE

Question No. 3 raises the issue of whether it is proper for an employer to consider an employee's proximity to a future retirement date as a reason to reject or fire that employee in the present.

At bar, the Second Circuit found that Delta was justified in rejecting Petitioners because of the

> inefficiency and expense of hiring large numbers of [older pilots] *on the verge of mandatory retirement* . . . even though their retirement was required by law at a specified age, and not determined by years of service or some other yardstick.

(7a). (Emphasis added).

The Circuit based that finding on its interpretation of *Hazen*. If this Court agrees that this interpretation of *Hazen* should be reviewed, certiorari should be granted as to Question No. 3.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted in all respects.

Respectfully Submitted,

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